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THE DEATH PENALTY.

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THE basis of argument for the death penalty against murder is found, along with the reason given for it, in Gen. v. 6: "Whoso sheddeth man's blood, by man shall his blood be shed; for in the image of God made he man." Nothing is plainer, by consent of the most accurate critics and scholars, than the translation and interpretation of this sentence. 1. The Creator is its author. 2. It is his benevolent statute for man's protection against the violence of man, because man is made in the image of God. 3. It being an acknowledged legal axiom that a law is in force while the reason for it remains, its universal and perpetual obligations are demonstrated. 4. The origin, institution, sanction, and right of human governments with penal inflictions are here determined by authority of the Creator, and not by any imagined compacts of mankind. 5. The nature and requisitions of justice, righteousness, equity, duty, expediency are in the terms of this legislation. The social obligations of mankind, and all governmental responsibilities, being referred exclusively to the will and word of the Creator, and the dictate of a conscience toward him, there is no other possible safeguard from men's evil passions. 6. The grasp of this law—thou shalt love thy fellow-creature, in God's image, as thyself—is upon all human interests, temporal and eternal, as revealed by God. Obedience to it would insure the highest and most perfect protection of all races in virtue and happiness. It is the very beginning of God's humane legislation for the new world, after a thousand

years' demonstration of incurable hereditary depravity in the old, and the consequent perversion and abuse of God's lenity toward Cain, filling the earth with violence. 7. Every state, being a trustee for God and the people, is bound to see to it that the people for whom God's whole law is promulgated are taught these truths, with the consequent sacredness of law and conscience toward God, were it only for the security of men's households and their own lives. If God's covenant with mankind had been kept conscientiously by mankind, there never would have been another murderer on earth from the time of the deluge to this day, nor even a religious persecutor. For God that made the world hath made of one blood all nations of men, and hath determined the times and bounds of their habitation, with this intent, that they should seek after God, and worship him in freedom, as being his offspring, who giveth to all life, and breath, and all things. And the powers that be are ordained of God, whose minister in an earthly government, prophetic of the divine, beareth not the sword in vain. 8. The death penalty was to be restricted to the crime of murder, and thence all penalties were to be graduated according to the offense, with the same unmistakable regard to the divinely constituted rights of family, character, property, and person, and the entire freedom and independence of a conscience toward God. With the same extreme of carefulness and exact justice, and for the perfection of its efficacy, the penalty was to be guarded from any possible mistake in its application through reliance on merely circumstantial evidence. Thus the legislation was as perfect as the benevolence and justice of God could make it.

Evidently there was required, in the foundations of a new social state, a penalty against murder to the last degree dreadful and deterring, fatal and final, with all the powers of human government ordained and pledged for its execution. God himself would make Cain's own dread of being murdered, through all men's sense of justice, inextinguishable, by having it established as the first law of humanity that, if any man destroyed another's life, his own life should go for it. And all the fiends of remorse, detection, and a righteous vengeance, with all the energies and vigilance of human selfishness itself, aghast with horror, should combine to arrest and exterminate the miscreant. This uproar of indignation and wrath was what Cain himself expected, when driven forth from the presence and protection of God.

The penalty is restricted to murder, though some crimes against personal rights are equivalent to murder, and produce it, and even worse, as, for example, slavery, and, in consequence, all the infinite horrors of the slave-trade. And, therefore, there shines forth, illuminating and illustrating the law against murder, like another sun risen on mid-noon, that other and later unparalleled Hebrew law in behalf of the enslaved: "He that stealeth a man and selleth him, or if he be found in his hands, he shall surely be put to death." This is the polarized light of the first penalty, crystallizing for all generations the meaning and insurance of the primal blood-statute; for no man in his senses will pretend that this grand edict of God's protecting and avenging mercy was never intended as a law, but was merely a prediction of the prevalence of legal murder. And so of the statute, in such absolute, imperative terms: "Ye shall take no satisfaction for the life of a murderer which is guilty of death, but he shall surely be put to death." (Num. xxxv. 31.) There was this insurance of the penalty laid upon every generation. It grew into one of the ever-present Eumenides in men's minds, as in the Book of Proverbs, "A man that doth violence to the blood of any person shall flee to the pit; let no man stay him." Hence, also, the careful and just definitions of what constitutes a murderer, and the requirement of witnesses as to the fact of the crime, evil intention being always essential, and mere circumstantial evidence not to be relied upon.

Malice aforethought once proved, the crime is demonstrated, and nothing shall save the murderer, not even the city of refuge provided by God himself for a just trial, nor the intervention of any pardoning or interceding power, nor the altar of God. "Thou shalt take the murderer from mine altar, that he may die." (Ex. xxi. 14.) If not, if the murderer is let off with his life, then the whole land remains guilty, and the blood of the murdered man crieth unto God from the ground; for the primal curse is on this crime against God's image in mankind, and no atonement or restitution can be made for it by man; none shall be accepted.

This is the secret of some of the most terrific tragedies of retribution by the Divine Vengeance otherwise so unaccountable, but as startling and warning for nations as for individuals. (See II. Sam. xxi. 1-14. See, also, the awful charge laid upon Solomon by David on his death-bed, II. Kings ii. 5, 6, 31, 33.) These are illustrative instances of that profound intuitive sense of the sacred-

ness of retributive justice, manifested by the inhabitants of Melita in the case of Paul. "No doubt this is a murderer, whom, though he hath escaped the sea, yet ἡ Δίκη—divine vengeance—suffereth not to live." This is the wonderful inspiration of similar classic utterances, so abundant, solemn, and familiar in the loftiest heathen tragedians and philosophers, whose beliefs in the providence of a just and righteous God were shared by these uncultured but thoughtful barbarians.

This law is the perfection of heavenly mercy itself, taking all right of revenge away from individuals and reserving the retribution for injuries as belonging to God's own attribute of impartial universal justice. The Sermon on the Mount is not more entirely God's law of love for all mankind than was the statute given through Noah for the whole world's good a covenant of divine wisdom for the education of the world in righteousness. It sets forgiveness in the heart of every human being, and proclaims revenge as murder. So the handwriting of God in the rainbow binding the storm was but the prophecy and prelude of that eternal melody in the song of the angels, "Glory to God in the highest, on earth peace, good-will to men," and of that celestial doxology, belonging to the perfection of all religion, in the worship of faultless prayer, "For thine is the kingdom, the power, and the glory, forever. Amen." As everything needful for mankind to ask is in our Lord's Prayer, so in that august, comprehensive transaction of God with Noah there was the perfection of all moral discipline, and just and peace-assuring criminal jurisprudence, by which men needed to be ruled on earth and educated for citizenship in heaven.

Thus, all retributive punishment, and all the securities and arrangements of God for it, are a concentration of all the lessons and energies of true moral discipline. All right training of the mind, the accurate tracing of consequences, an equitable connection of cause and event, and all disposal of awards, all retributions for guilt, must be grounded, first of all, in absolute justice. Otherwise, if utility alone were wisdom, and men the judges, the world's Caiaphases of expediency would become its glorified statesmen and saviours.

Now, the impossibility for any but an Omniscient Being to know and measure the absolute desert of every action, throws the whole power and right of governmental retribution upon the revealed authority and will of God, making government itself a

divine, paternal, protecting, educating institution, maintaining its permanence and right by a conscience in the people instructed toward God. The knowledge of God's law is in such education, securing obedience, independence, liberty, prosperity, and whatsoever things are true, honest, just, pure, lovely, and of good report. The God of peace is in and with such a socialism, and not the savageness and selfishness of the survival of the fittest. And this is the mighty educating power of law proceeding from the bosom of God as the Father of his intelligent creatures, and acknowledged and executed by human governments.

The efficacy of the penalty against murder can be demonstrated (1st) by restricting it to murder, and (2d) by making it immutable and certain. The man who murders another kills himself. When the most hardened villain is made sure of that, who will strike the blow? Make the penalty exceptional and inevitable, as it ought to be, and murder would be unknown under a government of infallible justice. The divine edict would be found of such deterring efficacy that the government would never need to execute it. The known certainty of the penalty would put a stop to the crime.

But the certainty that a murderer cannot at any rate be punished with death would inevitably increase the crime, presenting such a powerful temptation to murder in self-defense, during the commission of any other crime whatever. This would make murderers out of common villains. It would tempt the midnight burglar even to begin his work of robbery with assassination for security in the process, and then to complete it, double-locked from discovery by the death of all the witnesses.

The law of God says to the criminal, Become a murderer, and you are lost. The abolition of the penalty says, Murder, and you are saved. The removal of the dreaded penalty holds out an inducement so diabolical to the highest crime, that it seems incredible that any humane form of socialism should entertain it for a moment. You may save your own life, it says, by killing the witnesses against you. You can only be imprisoned, even if you kill; but if any one tries to kill you, you have the right to kill him. You may even escape condemnation, if tried, by the plea of sudden insanity, into which the threat of death and the desire to escape are affirmed to have driven you.

Kill, and you may be defended, even by charge of the judge, and verdict of the jury, on the ground of sudden, irresistible frenzy,

or delirium from intoxication, and therefore not punishable. But the stealing of a million dollars is never thus protected; a well-planned burglary, never. Therefore the assassin has the advantage. The killing of the owner of the money may be a sudden madness; it may be even argued that it was accidental, or in self-defense, without intention to kill, and therefore not punishable: see the trial of Webster, for the murder of Parkman; also the case of Colt. If the owner had chosen, he might have saved his life by the sacrifice of his property, and so prevented the murder. By attempting to defend his property, he has compelled the burglar to become a murderer, because that crime was the safest—an insurance against punishment, all things considered, having made it profitable.

Thus, but too surely the abolition of the death penalty would offer a recompense to the highest criminal sagacity and boldness. And the more hardened the criminal may have become, through the laxity of law and the absence of any appeal to conscience and to God, the more the law defends him, in case of any midnight conflict; and he knows this beforehand, and reasons accordingly. If he breaks into a house, and stabs its sleeping owner, that he may not testify against him, his victim is abandoned by the law to the death-blow of the murderer, who secures his own life by taking that of the sleeper, while the assassin is as effectively protected as if a reward of his ferocity had been guaranteed.

Then, again, the moment the murderer is being tried for his life, the sympathies of the public and the press are moved in his behalf, so that even the sternest jury feel the impulse; and, if they convict, extenuating circumstances are pleaded; and even if the murderer is sentenced, petitions for reprieve, for a new trial, for pardon, for commutation of the punishment, are gotten up, and powerful reasons of humanity are urged, which, if resisted by the Governor, bring upon him and upon the law itself the accusation of being the actual murderers.

And the more effectively God's law and a future final retribution are denied, or obscured in the murderer's consciousness, by his never having heard of these truths in the common schools through which he graduated, and by the legal and social habit of denying the authority of the Scriptures and of God over both government and people (a habit which the exclusion of positive religion from the state, its constitutions, and its schools, fosters from childhood), the more rational and righteous it appears,

in his own view, to take care only of himself, no matter what becomes of others. He has never been taught that God requires murder to be punished by death, much less that there is an endless retribution, in another world, for crime unrepented of in this.

Had the state done its duty in his education, he would never have been a murderer. It is moral assassination by the state to have let him grow up in such brutality. A law so benevolent and illuminating as that of God against murder, with its very reason grounded in the immortality of man and his accountability to God, and his obligations of love to his fellow-man in God's image, binds the government to teach its whole meaning, and to proclaim it with all the light thrown upon it from God's successive revelations, from the precedents broadening down through ages, and from the final teachings of Christ. Government, in assuming the authority to punish, is bound to flash the whole lightning of the statute to the uttermost depths of society, till its divine meaning penetrates the entire mass.

To withhold such instruction, and thus educate the masses in ignorance both of God's claims and care, and then and thus to apply the penalty of death for crime, is at once such contempt of God, and such a process of cruelty and despotism against man, as would make government an agency of perdition. The acknowledgment of responsibility to God for the protection of human life, and for the enlightenment and freedom of the conscience, is incontrovertibly, therefore, the duty of all governments. Law is thus enthroned in God, and God in law; and the state, for insurance of its own permanence and usefulness, must wear its appointed seal and robes of majesty as "a power ordained of God," proclaiming that it maintains an authority received from God, by the enlightened conscience of its citizens toward God. This is the only perfect security for human freedom. The law, without such education of the people, and without the appeal to God, becomes a defiance and violation of his will. Its efficacy depends on its divine sanction being taught, and necessitates that teaching by the State. How otherwise can any government be honest, or any of its penalties just, humane, and reformatory?

Immediately after the dreadful murder of our revered and beloved Lincoln, President Garfield, then a member of the United States Congress, delivered in New York an address on the duty of the Government and people, closing with these memorable words: "Love is at the front of the throne of God;

but justice and judgment, with inexorable dread, follow behind. This nation is too great to look for mere revenge; but for the good of the future I would do everything."

In the United States, amidst increasing perils from the socialism of ignorant masses, annually multiplying by millions; with all conflicting infidel speculations and political theories, from Nihilism to Mormonism, let loose, and sensual and intoxicating habits unrestrained; with the suffrage universal, and violent factions, and strifes for office, gain, and power universal also; with scientific dynamites of revenge inviting every disappointed villain's handling—the proposed abolition of the divine law against murder would be more inhuman, reckless, and unjust than it would be to make a breach in one of the dikes in Holland, letting in the sea. God proposes to abolish the crime; man to abolish the penalty. God seeks our deliverance from sin; man our evasion of its consequences. Self-government under God is heaven. Self-government without God is anarchy and hell. Which will we choose?

GEORGE B. CHEEVER.

MR. HAND.

THE dispute as to capital punishment is, at the present time, narrowed down to the point whether it is permissible, justifiable, and expedient for the sovereign power, in any case, to punish the crime of murder by inflicting death upon the murderer.

Of the opponents of capital punishment, some deny the abstract right of government deliberately to destroy a human being, under any circumstances; some, without questioning the right, deny that a past and irremediable offense of any sort will justify such action; and others deny the expediency of the punishment for murder or other crime.

The theory once so generally received, that men, originally in a state of nature, voluntarily entered into a social compact, yielding some of their natural rights in return for protection, and that this was the origin of government, is now exploded, and it has been shown by the historical method, applied to social science, that social and political organizations have quite other beginnings. It seems to be quite needless to discuss the question of the natural, inalienable right of an individual to his life, not

forfeitable, and over which government can acquire no control. It is necessary to be conceded not only that the individual may, by conduct absolutely inconsistent with the public safety, forfeit his life to the sovereign, but that the sovereign may call even upon the blameless citizen, to sacrifice his life for the common good and in resisting the public enemy.

The question, therefore, of capital punishment for murder is one, not of power, but of justice and expediency. I, for one, believe that for that crime such penalty is necessary, justifiable, and expedient, and should be retained.

For many centuries, indeed, in all the principal nations of Europe, the death penalty was inflicted for various grades of crime against property as well as person, and, especially in England, for those even of trivial character. But now, in most of the civilized governments of the world, that punishment has, with rare exceptions, been reserved for willful murder—the deliberate and malicious destruction of a human being. As I have said, this penalty for such crime I think is necessary and proper, and should be retained.

Those who are opposed to capital punishment may properly rejoice that, in the last hundred years, so large a domain of lesser crime has been freed from the terrible punishment of death. The urgent reasons for the abolition of the death penalty in the case of crimes against property, and even most of the serious crimes against the person, when not accompanied with a murderous intent, are abundant, but are certainly not applicable to the crime of murder. These bloody laws were justly repealed as in violation of the fundamental principles of penal legislation established in modern times. They violated the principle that absolute necessity should alone authorize the destruction of mankind by the hand of man; that it is manifestly just that punishment should be graduated according to the enormity and malignity of the crime; that to apply the extreme penalty to all grades confuses the public mind as to the atrocity of the misdeeds themselves; that the disproportion of the punishment to the offense arouses pity for the offender, and creates indifference to the offense, and hence gives impunity to crime and contempt for the law; and that the infliction of the same punishment for stealing a shilling and for murder tends to lessen the horror and aversion naturally felt for the convicted perpetrator of the latter.

Surely, to punish with death, as was done in England before the reform of its penal laws, the association with gypsies for a month (see statutes of the fifth year of Elizabeth's reign, chapter ten), the writing an anonymous letter demanding money (see statutes of ninth George I., chapter twenty-five), the stealing of goods to the value of a shilling, the doing malicious damage to Westminster bridge, and other like offenses, is not defensible upon the same ground as the punishment of the awful crime of murder by the same penalty. And it cannot be contended that the repeal of the death penalty as to all crimes of a lower grade—a penalty, if inflicted at all, unquestionably to be reserved for the gravest offenses, and obviously disproportionate to any other—affords any argument for its abolition in all cases, however atrocious. The general gradual amelioration of the penal laws in Christendom for years past, and the substitution of other lesser punishments for the capital one, cannot, therefore, of themselves be insisted upon as an argument for total abolition of the latter.

I have had no opportunity to see the contributions on that side of the question in the present conference, and, of course, cannot anticipate whether such an argument may be adduced. It has, however, sometimes been used, and the mere partial abolition for the lesser crimes has been urged with some effect in persuading the public that "hanging for murder" was a remaining relic of barbarism existent in these modern days, and stood a last incongruous and monstrous monument of the illogical ferocity of our ancestors in applying death as the invariable punishment for offenses of every grade.

Aside from the suggestions already made, another answer to this argument may be drawn from the Scriptures. For, by an injunction to Noah and his family, the progenitors of the human race, given after the deluge, it was divinely commanded that "whosoever sheddeth man's blood, by man shall his blood be shed." This solemn sanction for punishing murder with death certainly is wanting as regards all other crimes.

Indeed, this argument has a much larger application. It is impossible to see how, in the minds of those who believe in the divine character of this record, in its absolute verity and its obligation binding upon humanity for all time, this command does not put an end to the dispute, and render further debate useless. Unlike many provisions to be found in other parts of the Penta-

teuch promulgated as parts of a penal code for the government of the Jews, here is nothing local, nothing temporary, nothing merely regulating the conduct of a particular nation under peculiar circumstances and in a particular country. It was not intended for nor addressed to any particular tribe or people, but was a solemn compact with the new father of the human race, expressly commanding and binding him and his descendants, in all times and countries, to punish the murderer with death. It was a decree necessarily *semper, ubique, omnibus*.

Similar injunctions to the Jewish people, referred to in the opening paper of Dr. Cheever, might repeat it in language more precise, but could not enlarge or intensify its obligation upon all men. It was the first great universal *law* promulgated to the world.

But that we deal, in these days, with a generation inclined to look with scant credulity upon the book of Genesis, its deluge, its ark, and its Noah, must be confessed. By some, at least, of the opponents of capital punishment, arguments other than the divine law announced to Noah, and its binding force on the world, will be demanded. By them, its authority will be denied, its application to modern society perhaps scouted, and its punishment for murder likened to the Old Testament punishment for witchcraft.

To these objectors it may be said that there are sufficient reasons for the punishment of murder by death in the nature of the crime and the necessity of the case. Something, indeed, should be allowed to the general usage of all civilized peoples. It creates at least a favorable presumption. The barbarous Frank, Saxon, or Goth valued human life in money. A murder was redeemed by a fine. The civilized Englishman, Frenchman, Italian, and Spaniard punish it with death, and for that crime have steadily retained that extreme penalty, while abolishing it in many other cases. With civilization came the idea of the enormity of the offense and its danger to society. From the moment the notion of a crime against the government rather than a mere injury to the family of the murdered man was formed, the necessity of the death penalty was recognized.

But, passing this suggestion, obviously, the first duty the sovereign (whether a monarch or the sovereign people) owes to the

citizen is the protection and preservation of his life from violence. In the absence of such protection, the peace and the order necessary to the social existence must disappear, and the security of the individual, indispensable to all social progress, is at an end. It follows that every safeguard and preventive possible in the nature of the case to be provided against the crime of murder, it is the manifest duty of the government to provide.

Within certain limitations, it may be laid down as generally true, that the legislature is justified in the infliction of any degree of severity necessary for the prevention of this great crime. Such severity is manifestly but a measure of self-preservation. The prevention of all crimes should be the main (although, as I suggest below, not the only) object of the lawgiver. But, as to murder, it is an object necessary to the very existence of society, that its total prevention should be measurably attained.

The punishment of death is unquestionably the most powerful deterrent, the most effectual preventive, that can be applied. Human nature teaches this fact. An instinct that outruns all reasoning, a dreadful horror that overcomes all other sentiments, works in us all when we contemplate it.

“The wearied and most loathed worldly life
That age, ache, penury, and *imprisonment*
Can lay on nature, is a *paradise*
To what we fear of death,”

says Shakespeare.

The ancients exercised a horrible ingenuity in punishments. They inflicted crucifixions, flayings, burnings, boilings, impalements, scourgings, exposure to wild beasts, and other tortures, which exhausted the invention of men; but that death was the final end of each gave even these their most awful terror. They shocked decency and humanity, and were, besides, useless refinements of cruelty, as preventives of crime, since the mere death of which they were the means outweighed all other horror. Take away that, and they were but temporary pains.

It has been found, by the experience of many nations and many ages, that death alone impressed the imagination of the people, and alone carried so vivid a horror, as to check the malignant passions and the deadly hand of the murderer.

It has been sometimes objected that facts do not bear out this assertion; that where the capital penalty was abolished, the

crime of murder did not increase; that as its abolition in England as a punishment for theft and other lesser crimes did not result in an increase of those, the same is found to be the consequence of total abolition. The space allowed me here does not permit a discussion of the statistics collected on this question. Suffice it to say, that the results, as shown from the reliable records, do not sustain so paradoxical a proposition. It would be in direct contradiction to the ineradicable instincts of humanity, if it were so. The loss of life is universally and instinctively dreaded beyond all other calamities by all classes of men—the rich and poor, the upright and vicious, the learned and ignorant alike; it is incredible that its certain infliction as the inevitable consequence of an illegal act would not have the supremest influence in preventing that act.

It may be true that communities are found, naturally law-abiding and tranquil, where capital crime is absent, although no death penalty exists; and again, that there are turbulent communities where murders are more frequent, although the laws are nominally severe. But it cannot be claimed, unless the laws are enforced, that such facts offer any argument. There can, of course, be no prevention of crime by the fear of death among a people where crime is rarely punished at all. Death, although pronounced in the statute book the punishment for murder, can have no terror for murderers when it is never inflicted. A known *brutum fulmen* can have no effect except to excite contempt.

This punishment is the only sufficient preservative to society; but to preserve, it must be inflicted. The convicted murderer cannot, of course, by his cutting off restore the murdered man to life, nor prevent the crime which he has already committed, but the certainty that such awful punishment will inevitably follow such crime is the preventive influence. If, as is unfortunately and disgracefully the case in certain sections of our own country, the crime of murder is hardly ever followed by a judicial execution, if the occasional lawless destruction of the murderer without trial is the only punishment he need fear, and depends wholly upon the mere chance momentary excitement of the community collected as a lynch-law mob, death, whatever may be the words of the statute book, is *not* there the actual punishment of murder, and, of course, the fear of it cannot operate to deter the would-be assassin.

Comparisons of such communities, where the death penalty is decreed by law but scarcely ever executed, with more quiet States, may permit a deceptive argument, but are certainly not proof against the efficiency of capital punishment. The question is whether a punishment, reasonably certain to be the result of an offense, will deter from its commission—not whether, in a lawless community, a law never enforced can be effective as, in itself, a scarecrow.

But it is said that, even in law-abiding communities, murderers escape justice because of the reluctance of the tribunals to impose an irremediable and irrevocable punishment. To some extent this is true; to the extent that there never should be conviction of a capital offense to which so awful a punishment is necessary, except in the clearest case, it ought to be true. But in most of those trials where an acquittal has been a clear failure and mockery of justice, it will be found that the juries have refused to find any guilt, although a verdict of manslaughter, punishable only with imprisonment, would have been entirely legal. In fact, the cases were those in which the mind of the tribunal was so warped by some prevailing prejudice, or sympathy, that their verdict was against the fact and the law, and would have been so, whatever were the penalty of conviction.

Indeed, an answer to these objections is furnished from actual experience, by the example of a great nation. In no country, since the reform of its criminal law, does the capital punishment more certainly follow the offense than in England; in no other country do juries more implicitly obey the law, and, in clear cases, find the murderer guilty, in disregard of all passing public excitement. And in no other country has human life become so safe, so sacred, and so completely protected. It contains a population who are subject to the most violent and brutal passions; immense inequalities of wealth and poverty afford strong temptations to crime; and yet, by the certainty of the death penalty, the crime of deliberate murder is, more perhaps than in any other country, completely prevented.

But it is objected, why were not theft and robbery extirpated there when the same penalty was applied to them, and why have these crimes not greatly increased since the abolition, as to them? The answer I have already suggested. The sense of justice was shocked by the discrepancy between the comparatively trivial crime and the disproportionate punishment. For that reason,

judges and juries vied with each other in dodging the letter of the statute, and mitigating the punishment, and the law became almost a dead letter.

But it is sometimes said, "To hang a man is a very poor use to which to put him." If the sole object of government is to deal with a red-handed murderer as "an erring brother who has sinned from ignorance, but is to be pardoned, elevated, and redeemed"; and to aim solely at his welfare, this saying is, I admit, puzzling. If no regard is to be paid to the public safety, except in the correction and amelioration of the murderer as one of the public; if the only purpose to be considered is the instruction of the poor fellow by suitable teaching, so that, perchance, he may be taught and persuaded "not to do so again," this saying has some force. But, even then, the substitutes suggested by the abolitionists do not avoid the difficulty. Perpetual imprisonment is hardly a more profitable use to be made of a man than hanging him, and such use for a hardened villain is perhaps somewhat more unprofitable to an overtaxed community than fairly putting him out of the way at once.

But this sentimental view of the criminal is a vicious one. The writings of Victor Hugo, and others of like tendency, have done much to foster it, and it is, in the present time, dangerously weakening the sinews and paralyzing the arm of justice throughout the world. Carlyle thus vigorously sums up the case:

"A scoundrel is a scoundrel; that remains forever a fact; and there exists not in the earth whitewash that can make the scoundrel a friend of this universe; he remains an enemy, if you spent your life in whitewashing him. He wont whitewash; this one wont. The one method clearly is that, after fair trial, you *dissolve partnership* with him; send him, in the name of Heaven, whither he is striving all this while, and have done with him."—*Essay on Model Prisons*.

I have already suggested that prevention, although one, was not the only purpose of the infliction of penalties.

If prevention was the sole object to be sought, in disregard of all other considerations, some strange consequences would result; and there would be no limit to any severity, if found effective, to deter from crimes even of the lighter grades. Attainder of blood, confiscation of property, would become justifiable. Indeed, the doctrine, certainly unsound, of Justice Blackstone (Commentaries on the Laws of England, Book IV., pages

16 and 240), that the severity of the law may be in proportion to the ease with which offenses are committed; and that "it was but reasonable that, among crimes of equal malignity, those should be most severely punished which a man has the most frequent and easy opportunities of committing—which cannot be so easily guarded against as others, and which therefore the offender has the strongest inducement to commit," would be difficult to deny. Petty larceny is a crime "the least easily guarded against," and which the offender has the "strongest inducement to commit," and therefore, with a view to prevention alone, might be visited with the severest penalty.

In truth, there is inherent in all punishment for crime the idea of executing justice, of rewarding the offender according to his misdeeds. It is an idea entirely separate from and independent of any notion of prevention, or even of public safety.

"Vengeance is mine and I will repay, saith the Lord," but vengeance—righteous vengeance—is the right and duty of the state. The state is, in this respect, the representative of the Divine Governor. To it, the sword of justice and retribution is delivered. By it, it must be wielded.

Capital execution upon the deadly poisoner and the midnight assassin is not only necessary for the safety of society, it is the fit and deserved retribution of their crimes. By it alone is divine and human justice fulfilled.

This is the crowning and all sufficient ground for the destruction of the convicted murderer by the civil power.

Although it should become absolutely impossible that any president of the United States should hereafter be assassinated; although it could be demonstrated that the death of the assassin was, as a measure of prevention merely, absolutely needless; although the sentimentalists should cry out that the murderer was a hardened villain, as unprepared to die as Barnardine, "who apprehends death no more dreadfully, but as a drunken dream, careless, reckless, and fearless of what's present or to come," and that years were needed to instruct and ameliorate him—would not the heart of every sane citizen in the republic feel that the crime must be expiated by the last punishment, and that until this was done, a solemn duty of the state was neglected, and "the voice of blood would cry from the ground" for justice? Passion, prejudice, devilish revenge there must be none. The individual is presumed innocent. The law proceeds calmly,

impartially to investigate the fact. But if, after fair trial, after clear proof, he stands convicted, then let him meet the just deserts appointed by eternal justice for such as he.

The law wages no war upon any citizen. It imposes a fit retribution only upon the cold-blooded villain who has malignantly destroyed a human being. Its blow falls upon him only who has been found by legal trial and declared by a legal judgment to be such a villain. Its act is far from all passion, all mob violence. It is the effect of a holy, just indignation, not hot or temporary, but abiding and eternal.

Government is a trust, and there can be no higher exercise of that trust than the cutting off, in open day, before high heaven, solemnly and with deliberation, the man proved unworthy of a longer existence among his fellows. //

SAMUEL HAND.

MR. PHILLIPS.

I AM glad to join in any debate with so earnest and brave a soul as Dr. Cheever—a man trained to the severest logic; every one of whose words comes from the depths of stern and conscientious conviction—a prophet who, in perilous times, and at great risk, prophesied right things, not smooth things, to a rebellious people. He is no carpet knight, and debate with him is no sham fight.

Late events have intensified the interest in this question, and directed public attention strongly to it. This, then, is the God-given opportunity for correcting wrong opinions and impressing right ones; the minds of writer and reader are both hot, and every argument suggested welds itself into the public thought with solemn and effective power, food for deliberate reflection in cooler moments. To get men to listen is half the battle, and the hardest half, in all reforms.

If any one, at such a moment as this, doubts the correctness of public opinion on capital punishment, now is the hour, above all others, for him to utter his protest and enforce his views.

The word *punishment*, capital or any other, when used in reference to human government, is a mistaken and misleading term. Punishment has relation to guilt. Only that power, there-

fore, which can measure guilt is competent to affix penalty and to punish. As Dr. Cheever says: "All penalties were to be graduated according to the offense"; "retribution for guilt must be grounded, first of all, in absolute justice"; and he admits the "impossibility for any but an Omniscient Being to know and measure the absolute desert of every action."

"It is from an abuse of language that we apply the word *punishment* to human institutions. Vengeance belongeth not to man" (Eden, Princ. of Penal Law).

Of course, no human official can measure the strength of inherited tendency toward any act, criminal or any other; the power of temptation, the moral and intellectual training of the individual, or of the community and age in general, which go so far to form the moral sense of a man and educate his conscience; the circumstances, in fact, which aggravate or lessen criminality. Only Omniscience knows these. Yet these make it a fact that one man may commit murder with less moral guilt, in the eye of God, than another steals, or lies about his neighbor.

It will relieve some of the difficulties of this question if we rid ourselves of this idea of punishment, so far as human governments are concerned. Human governments are only authorized to restrain and chastise an offender, with the purpose and motive of preventing the recurrence of the harmful act he has done. To prevent the individual from repeating his offense, and to deter others from following in his steps—these are the only ends which human government can rightfully have in view. Governments are authorized to inflict pain in order to prevent evils, not with any idea of punishing guilt. Until human government has the plummet of Omniscience to sound the depths of the human soul, its weakness and its wickedness, its too ready yielding to temptation, or its vain effort to resist it—until then the attempt on its part to punish guilt is idle, because out of its power, and criminal, because sure to make it work injustice.

"Punishment," said Dr. Cheever, in his "Defense of Capital Punishment," printed in 1846, "is sometimes called for apart from the question whether it be useful or not"; and "There is such a thing as retributive justice, apart from the purpose of security against crime, or the necessity of the guardianship of society and the universe." And Theodore Frelinghuysen affirms that "the culprit is doomed to suffer because he deserves to suffer."

Such statements as these have their proper place in the pulpit

and in discussions touching the moral government of the universe. But they mistake entirely the limited ability and authority and the proper function of human governments.

The statute of Pennsylvania, 1794, well says: "The design of punishment is to prevent the commission of crimes, and to repair the injury that hath been done thereby to society or the individual."

With a more Christian philosophy than that which underlies the remark of Frelinghuysen, the pagan Seneca says: "*Nemo prudens punit quia peccatum est, sed ne peccetur*"; or, as Judge Buller once roughly translated it: "Prisoner, you are not hung for stealing this horse, but that horses may not be stolen."

With this view of the purpose of punishment all the great writers on penal legislation agree,—Franklin, Beccaria, Bentham, and others,—and all those who have discussed this special question,—Montaigne, Livingston, Rantoul, Romilly, Brougham, Montagu, Cobden, and the rest. As Wordsworth sings:

"Fit retribution, by the moral code determined,
Lies beyond the State's embrace."

But it cannot be denied that New England and the States planted by her sons ignore this principle, and punish murder with death, chiefly because men believe they are ordered so to do by the Old Testament, in that verse of the so-called covenant with Noah usually translated: "Whoso sheddeth man's blood, by man shall his blood be shed." (Genesis ix. 6.)

For myself, I am free to say that I think this whole covenant refers exclusively to food, and the verse just quoted, with those which precede it, is a prohibition of cannibalism—nothing more.

But, waiving this, let me submit:

First. The theory of government, as universally held in this country, is that government is a "social compact,"—"a voluntary association of individuals." Therefore, as an individual has no right to take his own life, he cannot confer on government any right to take it. Indeed, M. Urtis—who published in Paris, in 1831, a very able defense of capital punishment—grants its opponents that, if he allows government this right, he is logically obliged to admit the right of suicide.

This principle, however,—that society has no right to take life as a method of punishment,—is the opinion held by Lafayette, Gilbert Wakefield, J. Q. Adams, Franklin, Beccaria, and

many of the ablest writers on social science. Without insisting on it, at this point of our argument, it is fair to claim that on so momentous a question any supposed command to the contrary should be unequivocal, positive, clear, and abundantly proved.

Dr. Cheever acknowledged years ago that this Scripture proof was "somewhat limited, though plain and powerful." Almost its whole strength rests on a single verse, of very questionable meaning. Of this passage (the verse just quoted) Dr. Cheever said: "It is the citadel of our argument, commanding and sweeping the whole subject."

Now this verse, upon which such momentous powers are rested, may, all scholars allow, be equally well translated "by man *will* his blood be shed," making it merely a prophecy, as "by man *shall* his blood be shed," making it a command. So that, as THE NORTH AMERICAN REVIEW thirty years ago suggested, this tremendous power claimed rests, not only on a single verse, but on a single word, and that word equivocal in its meaning.

Again, our translation says, "*by man* shall his blood be shed." But "no version of the Bible prior to the fifth century contains the words 'by man,' and Scripture itself has been interpolated to suit the purposes of the state." ("Eclectic Review," July, 1849.) The Septuagint and the Samaritan versions omit these words; Wycliffe also, and the Vulgate; Spanish, Italian, and French versions omit them. Pascal and Swedenborg indorse the omission, and Calvin calls the translation which renders the Hebrew text "by man," a "forced" construction.

If these authorities are relied upon, the verse will read: "Whoso sheddeth man's blood, his blood will (or shall) be shed," and the idea of a command becomes more uncertain and shadowy still, since "shall" in such connection is not necessarily a command. For instance: "All they that take the sword shall perish with the sword." Is this a command to kill all soldiers? "Bloody and deceitful men shall not live out half their days." Are such bidden to kill themselves? "Whoso diggeth a pit shall fall therein." Is this a command?

Call this equivocal verse in Genesis a warrant from the Almighty! Why, a county sheriff would not arrest a sheep-thief on so ambiguous a warrant.

Second. But the contemporaneous understanding of a law is of the highest authority. Now if this verse be a command, that every murderer shall die, it is remarkable that neither did he who gave

it conform to it, nor did any of his creatures obey it, in the most striking instances of murder that have taken place. Cain was a murderer at a time when the idea of a murderer at large and unrestrained, in a world with very few inhabitants, must have been fearful. Yet God allowed him to live. Lamech, also a murderer before the flood, was spared. After the flood, Moses, a murderer; was admitted to the immediate presence of the Highest, and David, the most atrocious of murderers, was still the "sweet psalmist of Israel," dying in "a good old age, full of days, riches, and honor." Indeed, all the great murderers in Jewish history—Absalom, Simeon, Levi, and the rest—did not have their "blood shed," but died in battle or in their beds.

Third. The most ardent advocate of capital punishment, as said to be ordered by this covenant with Noah, does not, and never would, undertake to obey it. No civilized government would obey it, or ever did. For if this be a law of God, binding on all men, in all ages and in all circumstances, then it admits of no change and no exceptions.

This command, if it be one, was given before governments existed—given then to individuals. The nearest of kin—"the avenger of blood," as the Old Testament phrases it—was to execute this sentence of death—as he usually did in ancient times, and especially under the Jewish law, where Moses recognized his right to do so. It is, then, the duty now of the nearest of kin to avenge the killing, without waiting for the action of any government, which can never release an individual from obeying a command of God issued to him. We are not allowed to substitute another in our place to carry out an order which the divine law issues to us. Nothing can excuse us from personal obedience. And especially if government acquits the man whom the nearest of kin considers guilty, which is so often the case, then the "avenger" under this law must act on his own conscience, and do the duty which government has failed to do. Where can we find any warrant for saying that now, since government exists, the "avenger" is released from a duty which this solemn command of God laid on him? Even Moses, much as he changed old customs, did not take from the "avenger" this right to slay. Hence, what we call "lynch law" becomes a religious duty and a divine ordinance.

Further, we must kill every beast that kills a man; we must, as the Jews now do, kill all animals in such manner as to avoid

eating "blood." Even the apostles, when they released the Gentile world from the heaviest of Jewish burdens, still insisted on their obeying this part of the Noachian covenant, to "eat no blood." Yet Christians have quietly ignored it, and the apostles' indorsement of it also. But the command to shed the blood of the man-killer is no more sacred a part of that covenant than this of "eating no blood." And yet any man who preached the observance of such nicety to-day would be laughed at.

Any man who kills another by accident, without intention to harm him, must be killed. No matter what be the extenuating circumstances of any killing, no man or government is authorized to pardon, but the strict law must be fulfilled in every case, and in all circumstances; the soldier who kills another in war must die; the insane man who sheds blood, and the man who in self-defense kills his assailant, forfeit their lives, etc., etc.

Do you object and say, "Oh, no; we must construe the command, not as it was construed then, but as the circumstances of our day and our light demand"? Exactly; well, we will meet you on that ground, and cheerfully give the supposed command all the weight in present legislation which we think it ought to have. Do you remind us that Moses allowed one who had shed blood accidentally, or without malice, to flee to a city of refuge—and as long as he staid there the "avenger" could not harm him?

Very true. Moses then felt justified in making exceptions to this command, if it were such; after the lapse of a thousand years, and when change of condition and established government, and improved civilization, allowed it.

Moses set us a good example; and now, after thirty-five hundred more years of growth, and a still more entire change of condition, and far greater improvement of civilization, and the opening of a new dispensation, which abrogates the "eye for eye, and tooth for tooth," we take example by the great Hebrew reformer, and conform methods to our day and needs, seeking only to keep sacredly to the idea and spirit which underlie the wise and humane records of inspiration.

When any supporter of capital punishment, on the ground of the Noachian covenant, eats no beef except that which is killed according to the present Jewish method; insists on the slaying of every animal that has caused a man's death; and on the killing, by government or the avenger, of every man who has even accidentally killed his fellow, I shall think he really and honestly

believes in the argument he uses. I never found any such man. Until I do, I am forced to believe that such disputants deceive themselves, and imagine that they cherish such a faith; but any endeavor to carry it into action would rouse their contempt or their heartiest indignation.

Fourth. The moment we quit the plane of divine command, and come down to the level of human law, the argument assumes an entirely different shape. The first question is, has the police power in any circumstances, or for any reason, the right to take life? We may say, with Beccaria, Fayette, and Franklin: "The power over human life is the sole prerogative of him who gave it. Human laws, therefore, are in rebellion against this prerogative when they transfer it to human hands."

Or even with Blackstone, a much narrower and more timid mind: "Life is the immediate gift of God to man, which neither can he resign, nor can it be taken from him, unless by the command of him who gave it."

But this argument is too large for our narrow limits. Any one interested in it can see the subject exhaustively discussed, and the right denied for the soundest and strongest reasons, in the essays of Franklin, Beccaria, Livingston, Burleigh, Rantoul, and O'Sullivan.

Even those who claim that government does possess the right, have been driven by stress of argument and the most convincing experience to agree with Dr. Cheever, that the death penalty should be "restricted to murder"—not, as in centuries gone by, be visited on trifling offenses, from a mistaken idea that mere severity of punishment prevented crime. But even if we restrict the punishment of death to murder alone, when we remember our experience that the infliction of the death penalty nourishes the spirit of revenge, demoralizes the community (a fact confessed by the now almost universal custom of private executions), lessens the sacredness of human life, largely prevents the prosecution and, to a great extent, the punishment of crime, it becomes evident that you must prove the death penalty absolutely necessary before government is justified in using it. No amount of expediency will authorize "breaking into the bloody house of life" at the risk of such evil results. The opinion of old Sam. Johnson, that unnecessarily severe punishment "very rarely hinders the commission of crime, but naturally and commonly prevents its detection"; of Chief-Justice Denman, that extreme

severity has "operated more as a preventive to prosecutions than as a preventive to crime"; of Whately, that the punishment which a community deems too severe leads the very sufferers by a crime "to promote the escape of the guilty,"—all these testimonies get fresh support from the memorial of the Attorney-general of Massachusetts to the Legislature in 1842, when Massachusetts punished only six crimes with death:

"In the present state of society it is no longer an abstract question whether capital punishment is right, but whether it is practicable; and there is good reason to believe that the punishment of death for crime would more certainly follow the commission if the Legislature should still farther abrogate the penalty of death. As the law now stands, its efficacy is mostly in its threatenings; but the terror of trial is diminishing, and the culprit finds his impunity in the severity which it denounces."

Now, that capital punishment is not absolutely necessary for the protection of society, in almost any epoch of civilization, is proved by the amplest testimony. Egypt, for fifty years during the reign of Sabacon; Rome for two hundred and fifty years; Tuscany for more than twenty-five years; Russia for twenty years of the reign of Elizabeth, and substantially during the reign of her successor, Catherine; Sir James Mackintosh in India for seven years; the State of Rhode Island since 1852; Michigan since 1847; Wisconsin; Maine since 1835; Holland since 1870; Saxony since 1868; Belgium since 1831; and several other states, prove, by their experience, that life and property are safer with no death penalty threatened or inflicted, than in the neighboring countries which still use the death penalty. The evidence is ample and the demonstration perfect; the plea that this fearful penalty is necessary is no longer admissible. Facts annihilate its foundations. And observe that every such experiment has succeeded. The weight of this evidence is not lessened by the necessity of balancing some failures against other successes. All the tracks lead one way. And if not absolutely necessary, the death penalty must be extremely injurious. All experience confirms the universal judgment of those who have studied this subject, and which Rantoul utters when he says, "The strongest safeguard of life is its sanctity; and this sentiment every execution diminishes." Indeed, unless the death penalty can be shown to be absolutely necessary, it has been well said that society, in inflicting it, commits a second murder.

The number of persons sent to execution by the courts, and afterward proved to be innocent, has been counted by hundreds in Great Britain, and must probably be counted by thousands, taking in even only the civilized states. When we add those probably innocent, but never clearly proved so, and thus run up the number to tens of thousands, what fearful power such a fact gives to the protest of Lafayette: "I shall persist in demanding abolition of the punishment of death, until I have the infallibility of human judgment demonstrated to me."

"A few such instances, even, in a century are sufficient to counteract the best effects that could be derived from example. There is no spectacle that takes such hold on the feelings as that of an innocent man suffering an unjust sentence. One such example is remembered when twenty of merited punishment are forgotten, the best passions take part against the laws, and arraign their operation as iniquitous and inhuman. This consideration alone, then, if there were no others, would be a most powerful argument for the abolition of capital punishment."—*Livingston*.

The "terror argument"—the idea that any punishment, capital or any other, deters men, in any useful or appreciable degree, from the repetition or imitation of crime—is discredited by the best authorities. In a remarkable correspondence, forty years ago, between Lords Brougham and Lyndhurst, it is assumed, on the authority of all the police magistrates of Great Britain, that this idea of terror from example is a delusion, and that the expectation of relief from that influence must be abandoned.

Analyzed to its last result, this attachment to the death penalty will be found, in most cases, to be really a feeling of revenge. All close inquirers find it to be so. Livingston records a remarkable confession of it made to himself. Sir H. S. Maine says (in his "Ancient Law"): "There is a time when the attempt to dispense with it [*i. e.*, the death penalty] balks both of the two great instincts which lie at the root of all penal law. Without it the community neither feels that it is sufficiently avenged on the criminal, nor thinks that his punishment is adequate to deter others from imitating him."

When we remember that it has been proved, by the most abundant and trustworthy evidence, that "the greater proportion of crime is the result of poverty and early privations"; that the wisest experts agree that "in by far the greater proportion of offenses crime is hereditary"; that one-half, perhaps two-thirds, of those who take life are flagrant instances of society's gross neglect in educating the souls God commits to its keeping;

inherit ungovernable passions and minds just hovering on the borders of insanity, if not wholly insane and irresponsible; that, as Dr. Prichard says, "The difficulties with which administrators of public justice have to contend in distinguishing crimes from the result of insane impulse will never be entirely removed,"—this malignant feeling of revenge toward most criminals becomes ferocious and brutal.

Mr. Clay, the veteran and well-known chaplain of Preston Gaol, denounced as "selfish cowardice this cry for indiscriminate vengeance on all sorts and conditions of criminals—as if the comfort and ease of self-asserting respectability, riding paramount on the surface of society, was altogether to outweigh the rights, temporal and eternal, of the helpless, inarticulate mass below."

Bulwer reminds us that "Society has erected the gallows at the end of the lane, instead of guide posts and direction boards at the beginning."

And Dr. William Ellery Channing says, in the same strain, "When I reflect how much of the responsibility for crime rests on the state, how many of the offenses which are most severely punished are to be traced to neglected education, to early squalid want, to temptations and exposures which society might do much to relieve, I feel that a spirit of mercy should temper legislation; that we should not sever ourselves so widely from our fallen brethren; that we should recognize in them the countenance and claims of humanity; that we should strive to win them back to God."

It is evident from the tone of the press, from the excitement and bitterness we see everywhere in the community, and from the very language of one of my comrades in this discussion, that the feeling against Guiteau is one of revenge, rather than a cool and dispassionate care for the safety of society.

This pitiable and misbegotten wreck, who is only just within, if indeed he be within, the limits of moral responsibility, and who could not probably be proved the direct cause of the President's death, to the satisfaction of any jury assembled one year or twenty months hence,—if, carried away by hot revenge, the people hang him, it will be a blot on the justice of the American people which, probably within five years, men would do anything to erase, and which history will record as one of the most lamentable instances of temporary madness, or as evidence how much of actual barbarism lingers in the bosom of an intelligent and so-called Christian community.

WENDELL PHILLIPS.